No. 129.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

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COUNTY COMMISSIONERS OF WICOMICO COUNTY

vs.

SAMUEL BANCROFT, JR.

Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

Brief for Respondent, Samuel Bancroft, Jr.

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COUNTY COMMISSIONERS OF WICOMICO COUNTY

vs.

SAMUEL BANCROFT, JR.

Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

The respondent, Samuel Bancroft, Jr., filed his bill of equity in the Circuit Court of the United States for the District of Maryland, seeking to enjoin the petitioners from levying taxes on the mortgaged property of the Baltimore, Chesapeake and Atlantic Railway Company, represented by the bonds, whereof the respondent is the holder of twenty, having the par value of $1,000 each, and from enforcing the payment of taxes by the sale of the property. A demurrer to the bill was filed in behalf of the petitioners, the respondents below. This demurrer was overruled in an opinion filed by the Circuit Court Judge. (Record, page 16.) Afterward, upon a hearing of the case upon its merits, a decree was signed by the Circuit Court Judge

declaring a part of the property of the Baltimore, Chesapeake and Atlantic Railway Company to be exempt from taxation at the hands of the petitioners, the respondents below. (Record, page 123.) Thereupon cross-appeals were filed in the United States Circuit Court of Appeals for the Fourth Circuit, which Court affirmed the decision of the Circuit Court, the case being reported in 135 Fed. Rep., page 977. The case is now brought to this Court by a writ of *certiorari* granted at the instance of the petitioners.

It appears from the admitted facts in the case (Record, page 26, *et seq.*) that the Baltimore and Eastern Shore Railroad Company, a corporation formed to build a line of road from Eastern Bay, in Talbot county, to the town of Salisbury, in Wicomico county, obtained from the Legislature of Maryland an Act enlarging its powers and granting it certain privileges and immunities. This Act forms chapter 133 of the Acts of Assembly of 1886, and the sections of the Act more particularly pertinent to the issues in this case, are sections Nos. 2, 4 and 5, which read as follows:

"Section 2. *And be it enacted*, That said corporation shall have perpetual existence, and its franchises, property, shares of capital stocks and bonds shall be exempt from all State, county or municipal taxation for the term of thirty years, accounting from the date of the completion of said road between the *termini* mentioned in its charter.

"Section 4. *And be it enacted*, That the said Baltimore and Eastern Shore Railroad Company aforesaid shall have power to unite, connect and consolidate with any railroad company or companies, either in or out of this State, so that the capital stock of said companies so united, connected and consolidated (respectively), may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company and be entitled to all the property, franchises, rights, privileges and immunities which each of them

possess, have and enjoy under and by virtue of their respective charters.

"Section 5. *And be it enacted,* That the Baltimore and Eastearn Shore Railroad Company shall have power to lease or purchase and operate any railroad or railroads, either in or out of this State, for the purpose of carrying on their business, and any other railroad company in this State shall have the right to lease or sell its railroad or other property to the said Baltimore and Eastern Shore Railroad Company."

The Baltimore and Eastern Shore Railroad Company, having duly accepted the provisions of the Act, proceeded to construct its road between the termini mentioned in its charter, which construction it completed in August, 1891. In June, 1890, it purchased all the property of the Wicomico and Pocomoke Railroad Company, which was duly conveyed to it by deed (Record, page 28). The Wicomico and Pocomoke Railroad consisted of a line about thirty miles long, extending from Salisbury to Ocean City, and with the road built by the Baltimore and Eastern Shore, constituted a line about ninety miles long from Eastern Bay, to the Atlantic Ocean.

After the Baltimore and Eastern Shore had acquired the Wicomico and Pocomoke, it proceeded to mortgage the whole of its property to secure an issue of $1,600,000, par value, of mortgage bonds. (Record, page 29.)

This mortgage (Record, page 53) describes the property conveyed as being "all and singular the entire line of railroad of the party of the first part (the Baltimore and Eastern Shore R. R.), situate, lying and being in the State of Maryland, between Broad Cove, Eastern Bay, Talbot County, and Salisbury, in Worcester (*sic*) county, and extending from said termini through the counties of Talbot, Caroline, Dorchester and Wicomico, in said State, and also all the line of railroad between Salisbury, Wicomico county, and Hammock Point, in Worcester county, in said State, which last mentioned railroad comprised

the railroad of the Wicomico and Pocomoke Railroad Company, an entire distance of about ninety miles " and also steamboats, docks, piers, rolling stock, etc., etc. ; and the rights, privileges, franchises, immunities and exemptions, including the " immunity and exemption from taxation granted to, conferred and bestowed on the party of the first part." (Record, page 69.)

It further appears (Record, page 35) that in 1894, the above mortgage was foreclosed by decree of the Circuit Court of the United States for the District of Maryland, and that the purchaser of all of the above described mortgage property at the foreclosure sale proceeded to organize a corporation under the name of the Baltimore, Chesapeake and Atlantic Railway Company, under the provisions of sections 187, 188 and 189, of article 23 of the Code of Maryland, 1888, (being sections 275 *et seq.* Code 1904.((Record, page 70.)

These sections provide as follows :

Section 187 provides that in case of the sale of any railroad under foreclosure of mortgage, the purchaser may form a corporation for the purpose of owning, possessing, maintaining and operating such railroad, by filing in the office of the Secretary of State a certificate of the name and style of such corporation, the number of directors, etc., etc.

" Section 188. Such corporation shall possess all the powers, rights, immunities, privileges and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same which were possessed and enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter, and any amendments thereto, and of any other laws of this State."

Section 189 provides that such corporation may mortgage its property, immunities and franchises.

It also appears (Record, pages 29 and 30) that the respondent is the holder of mortgage bonds, issued by the Baltimore, Chesapeake and Atlantic Railway Company, secured by a deed

of trust conveying to the Atlantic Trust Company, as trustee, the property formerly belonging to the Baltimore and Eastern Shore Railroad Company, and other property subsequently acquired by the Baltimore, Chesapeake and Atlantic Railway Company.

That the petitioners are the County Commissioners of Wicomico county, and have levied and assessed taxes upon all of said property, and threaten to sell the same for non-payment of the taxes. (Record, page 31.)

That the Atlantic Trust Company is a citizen and resident of the State of New York, and declines to take proceedings unless demand be made upon it by a majority of the bondholders, which demand the respondent has no means of procuring. (Record, page 33.)

The property in Wicomico county covered by the mortgage to secure the bonds owned by the respondent may be divided into three classes:

Class (A). Property formerly belonging to the Baltimore and Eastern Shore Railroad Company, and forming a part of the line built by it under its charter power to construct a road between Eastern Bay and Salisbury.

Class (B). Property formerly owned by the Baltimore and Eastern Shore Railroad Company and acquired by it under its purchase of the Wicomico and Pocomoke property.

Class (C). Property at no time owned by the Baltimore and Eastern Shore Railroad Company but acquired by the Baltimore, Chesapeake and Atlantic Railroad Company subsequent to its organization.

This last class consists mainly of steamboats and wharf property.

It also appears that in two cases, one, The Baltimore, Chesapeake and Atlantic Railway Company vs. the Mayor and City Council of Ocean City, and the other, The Baltimore, Chesapeake and Atlantic Railway Company vs. The County Commis-

sioners of Wicomico County, the Court of Appeals of Maryland decided that the property of the Railroad Company was not exempt from taxation. The respondent, however, was not a party to either of said suits, nor was any other bondholder, nor was the trustee under the mortgage. (Reported respectively 89 Md. 89, and 93 Md. 103.)

I.

Argument Upon the Demurrer.

The bill discloses a cause of action within the jurisdiction of the Circuit Court of the United States, in which it was filed, because

First. OF DIVERSE CITIZENSHIP AND AMOUNT IN CONTROVERSY.

Gaines vs. Fuentes, 92 U. S. 10-18.

Second. RESPONDENT WAS NOT A PARTY TO THE PROCEEDINGS REPORTED IN 89 MD. 89, AND IN 93 MD. 113, AND IS, THEREFORE, NOT ESTOPPED BY THE DECISIONS IN THOSE CASES.

It is well settled that a mortgagee is not bound by any proceedings against his mortgagor, which are not begun until after the execution of the mortgage unless he was made a party thereto.

Black, Judg., sec. 551.
Keokuk and W. R. R. vs. Missouri, 151 U. S. 301, 313, 314.
Campbell vs. Hall, 16 N. Y. 575.
Carroll vs. Goldschmidt, 83 Fed. Rep. 510.

Of the suits in the Maryland Court, one (89 Md., page 89) was one between the Baltimore, Chesapeake and Atlantic Railway Company, the mortgagor, and the Mayor and City Council of Ocean City. The other was between the mortgagor and petitioners.

The respondent, Bancroft, is the holder of twenty of the bonds, each of the face value of $1,000, issued pursuant to a

mortgage made by the Baltimore, Chesapeake and Atlantic Railway to the Atlantic Trust Company of New York long before the institution and decision of these case. If the mortgagee, the Atlantic Trust Company, who has only a naked interest in the property as mortgagee, is not bound by the decision in this case, *a fortiori* a holder of a part of the mortgage debt, the real, although not the technical mortgagee, is not bound.

Third. THE INTEREST OF THE RESPONDENT, BANCROFT, IS OF SUCH A CHARACTER AS TO ENTITLE HIM UNDER THE ALLEGATIONS OF THE BILL TO BE HEARD.

It is settled that, under the allegations made in the bill, a trustee could maintain an action.

The Baltimore Trust and Guarantee Company vs. The City of Baltimore, 64 Fed. Rep. 153.
S. C., 166 U. S. 573.

A stockholder could file such a bill.

Barnes vs. Koenegy, 62 Fed. Rep. 671.
Chicago vs. Sheldon, 9 Wall. 50.

And so likewise can a bondholder.

Thus, in a case strongly analagous:

> The mortgage bondholders of certain railroads in Texas, brought bills against the railroad companies and against the State Railroad Commissioners, and the Attorney-General alleging that full interest on the bonds was not being paid or earned by the railroads, because of the ruinously low rates established by the said commission upon which the companies were required to do business.

Held:

> That the complainants, the bondholders, showed an equitable interest in the fair earnings of the road; they show actual ownership and possession of the mortgage

securities of the roads, both of which they allege are being irreparably injured and threatened with destruction by the defendants; and that they could maintain the suit.

Mercantile Trust and Deposit Company vs. Texas and Pacific Railway Company, 51 Federal Rep. 529, 536.

Fourth. BECAUSE THE FEDERAL COURT IS NOT BOUND TO FOLLOW THE DECISIONS OF THE COURT OF APPEALS OF MARYLAND IN CONSTRUING THE MARYLAND STATUTES.

It is admitted that the original mortgage of the Baltimore and Eastern Shore Railroad, which was afterwards foreclosed, was executed and foreclosed long prior to the decisions rendered by Court of Appeals of Maryland. (Record, page 45.)

That the Baltimore, Chesapeake and Atlantic Railway was formed by the purchaser under the provisions of sections 187, 188 and 189 of article 23 of the Code of Maryland, 1888, (being sections 275, *et seq.*, Code 1904,) and the bonds owned by the respondent, were issued and secured by the mortgage dated September 1, 1894, *and had been acquired by the respondent in 1896, long prior to such decisions.* (Record, page 30.)

In other words, that the organization of the Baltimore, Chesapeake and Atlantic Railway Company, and the contracts between the railway and its bondholders had been entered into, and the rights of the bondholders thereon and arising therefrom, had accrued at a time when the decisions in question had not been made.

It is, we submit, the right of a complainant under this state of facts to have the independent judgment of this Court upon his rights. It is to that very end that the Courts of the United States are given authority to administer the laws of the State in controversies between citizens of different States.

The Mercantile Trust and Deposit Co. vs. Texas and Pacific Rwy., 51 Fed. Rep. 536.

We fully admit the doctrine that where a State statute has been construed, or a rule of property established *at the time a transaction is entered into*, or rights accrued, such construction, or rule, will bind the parties as fully as though written into the transaction; but where no such construction was then in force, we are entitled to have this statute construed by the independent judgment of this Court.

This point seems to us to be clear on the authority of the following cases:

Burgess vs. Seligman, 107 U. S. 20.
Carroll Co. vs. Smith, 111 U. S. 556.
Anderson vs. Santa Anna, 116 U. S. 356.

Burgess vs. Seligman is, perhaps, the leading case on this subject.

This was a case where the question arose over a State statute fixing the liability of the holders of stock.

The Supreme Court of Missouri had construed the identical statute, under consideration by the Supreme Court. The Supreme Court declined to follow the State Court's decision, and summarized the rule thus (page 33):

> "When contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued."

In Carroll Co. vs. Smith, the Supreme Court again declined to follow the decision of the Supreme Court of Mississippi, construing a State statute, saying (page 562):

> "It is a decision upon the very bonds here in suit, pronounced after the controversy arose, and between other

parties. It was not a rule previously established, so as to have become recognized as settled law, and of which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the Courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right under the Constitution of the United States, to the independent judgment of those Courts to determine for themselves what is the law of the State by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State suing in another, the choice of resorting to a Federal tribunal."

In Anderson vs. Santa Anna, the Court cite with approval Burgess vs. Seligman, and say, (page 362):

"When rights have accrued, before the State Court has announced its construction, the Federal Courts, although leaning to an agreement with the State Court, must determine the question upon their own independent judgment * * * we cannot depart from the long established doctrine which makes it our duty to determine the rights of parties, where those rights depend upon the local law, according to that law as judicially declared at the time such rights accrued, or in the absence of any such declaration, according to the law, as in our judgment, it then was."

We submit, therefore, on these authorities, that this respondent is entitled to have his rights determined according to the law as it existed on September 1, 1894, at which time the rights of bondholders accrued.

Louisville Trust Co. vs. City of Cincinnati, 76 Fed. Rep. 296.

THIS SUIT IS NOT IN VIOLATION OF THE REVISED STATUTES OF THE UNITED STATES, SECTION 720, FORBIDDING THE WRIT OF INJUNCTION BY ANY CIRCUIT COURT OF THE UNITED STATES TO STAY ANY PROCEEDINGS IN ANY COURT OF A STATE EXCEPT IN BANKRUPTCY.

The respondent does not ask that the petitioners be restrained from enforcing any judgment secured by them in any proceeding in a State Court. The taxes that the petitioners seek to collect from the property covered by the mortgage securing the respondent's bonds are those levied by the petitioners for the years 1900 and 1901 in the exercise of the powers conferred upon them by Section 7 of Article 25 of the Public General Laws of Maryland 1888 and 1904; or else by virtue of section 192 of Chapter 120 of the Acts of 1896. (See the Record, Prayer for Relief, page 12, and Agreed Statement of Facts, p. 31.)

The powers and duties of County Commissioners in Maryland are defined by Article 25 of the Code of Public General Laws (1888 and 1904) in compliance with Article 7 of the State Constitution, and additional methods provided for enforcing the payment of taxes are to be found in Article 81, Sections 26 and following. (Code 1888 and 1904.)

The methods of enforcing the payment of taxes established and recognized by the laws of Maryland are briefly as follows:

(*a*) By execution directly against the specific property.

The County Commissioners appoint Collectors. (Article 81, Section 31 of the Public General Laws of Maryland, 1888 and 1904.)

Upon failure to pay the taxes within the time prescribed by law it is made the duty of such collectors to proceed by distress or execution to sell the specific property in question.

Article 81, Section 49, Code 1888 (being sections 50 *et seq.*, Code 1904).

These duties are in their nature purely ministerial and do not in any sense constitute "a proceeding in a State Court," and, hence, the Federal Statute does not apply.

Weil vs. Calhoun, 25 Fed. Rep. 865.

The County Commissioners of Wicomico County are not a Court within the meaning of the Federal Statute. They are nowhere by any section of Article 25 clothed with judicial powers. There is no reference to them in Article 4 of the State Constitution, which deals with the Judiciary Department of the State Government.

(b) The County Commissioners may proceed to collect the amount of the taxes by an action of debt or other proceeding in a State Court.

Dugan vs. The Mayor and City Council of Baltimore, 1 G and J. 499.

The Federal Statute, however, is not directed at such a contingency, because it is well established that where the Federal Court has, as in the case at bar, first obtained jurisdiction, the Statute does not apply.

Railroad Company vs. Kuteman, 4 Circuit Court of Appeals, 506.

President, etc., vs. Merritt, 59 Fed. Rep. 6; and see a valuable note on the interpretation of Section 720 of the Federal Statutes appended to Garner vs. Second National Bank, in 16 Circuit Court of Appeals, page 90.

THIS SUIT IS NOT IN VIOLATION OF THE ELEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, FORBIDDING SUITS AGAINST THE STATE.

The eleventh amendment of the Constitution of the United States is not applicable to the case at bar, for whilst the amendment provides that no suit shall be commenced or prosecuted against the State, the prohibition is inapplicable if the State is not necessarily a defendent, notwithstanding the fact that the State's interest may be incidentally affected.

Accordingly, it has been held that where counties are under a State Constitution suable as municipal corporations, the Federal Courts have jurisdiction of suits against them.

See Lincoln County vs. Luning 133 U. S., and the following language of the Court through Justice Brewer, page 899:

"It was said by Chief Justice Marshall, in Osborne vs. Bank of the United States, 9 Wheaton, 733-857, that the Eleventh Amendment, which prevents the jurisdiction granted by the Constitution over suits against States is of necessity limited to those suits in which the State is a party of record.

"Whilst that statement was held by this Court in the case of Ayres, 123 U. S. 433, to be too narrow, yet by that decision the jurisdiction was limited only in respect to those cases in which the State is the real, if not the nominal, defendant; and while the county is territorially a part of the State, yet politically it is also a corporation created by and with such powers as are given to it by the State.

"In this respect it is a part of the State only in that remote sense in which any city, town or other municipal corporation may be said to be a part of the State."

The powers and duties of County Commissioners are defined by sections 1 and 2 of Article 25 of Public General Laws of Maryland, hereinbefore referred to. They are declared to be a corporation, and by Article 4 it is provided that they may sue and be sued; by Article 7 it is provided that they shall levy all needful taxes on the assessable property within the County liable to taxation and provide for collecting the same, etc. They represent the county, and litigation for and in behalf of the counties, as well as that against them, is conducted in their name.

County Commissioners of Howard County vs. County Commissioners of Frederick County, 20 Md. 432.

Eyler vs. County Commissioners of Allegany County, 49 Md. 257.

It is submitted, therefore, that the suit at bar is brought directly within the doctrine of—

Lincoln County vs. Luning, cited above.

II.

Argument Upon The Merits.

PART 1.

The fact relied upon by the respondent to support the claim that the property represented by the bonds is exempt from taxation, is—

THAT THE EXEMPTION GRANTED THE BALTIMORE AND EASTERN SHORE RAILROAD COMPANY FOR A PERIOD OF THIRTY YEARS FROM THE DATE OF COMPLETION, AUGUST, 1891, OF SAID ROAD BETWEEN THE TERMINI, CLAIBORNE AND SALISBURY, BY CHAPTER 133 OF THE ACTS OF 1886, WAS TRANSFERRED TO THE BALTIMORE, CHESAPEAKE AND ATLANTIC RAILWAY COMPANY WHEN THAT COMPANY WAS ORGANIZED UNDER SECTIONS 187, 188 AND 189 OF ARTICLE 23 OF THE MARYLAND CODE OF PUBLIC GENERAL LAWS OF 1888, BEING SECTION 275 AND FOLLOWING OF THE CODE OF 1904, TO ACQUIRE PROPERTY WHICH HAD BEEN FORECLOSED UNDER THE BALTIMORE AND EASTERN SHORE RAILROAD'S MORTGAGE TO THE ATLANTC TRUST COMPANY.

Section 187 provides that in case of foreclosure the purchaser (in this case, N. P. Bond), may form a corporation (in this instance The B., C. & A. Ry. Co.,) for the purpose of owning and possessing, maintaining and operating such railroad by filing in the office of the Secretary of State a certificate, etc.

Section 188 provides such corporation so formed, shall possess all the powers, rights, *immunities*, privileges and franchises in respect to such railroad or part thereof, included in such certificate, and in respect to the real and personal property appertaining to the same which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale, under or by virtue of its charter, and any amendments thereto and of any other laws of the State.

Now, it is respectfully submitted that the employment of the language, "powers, rights, *immunities*, privileges and franchises" in section 188 of the Code of Public General Laws of Maryland, is not only broad enough to transfer the exemption from taxation secured to the original railroad by section 2 of the Acts of 1886; but that is the *very* language which has been held *apt* and *technical* for this purpose by a line of decisions in both the Federal and State Courts, unbroken with the single exception of the case in 89 Md., page 89.

> Thus: The St. Louis and Iron Mountain Railroad was sold to satisfy certain liens, and was bought in by the State of Missouri. Subsequently, it was sold by the State to certain persons pursuant to an Act of the Legislature, which provided that the purchasers of the road should have the rights, franchises, privileges and *immunities* which were enjoyed by the original company.

Held, that this language would transfer to the purchasers an exemption from taxation enjoyed by the original company.

Trask vs. Maguire (1873), 18 Wallace, 391-405.

> By Act of the Legislature, the Pensacola Railroad was authorized to acquire from the Pensacola and Louisville Railroad Company, by purchase and assignment, all the property, rights, franchises, privileges and *immunities* of the Pensacola and Louisville Railroad Company.

Held, that this carried an exemption from taxation enjoyed by the Pensacola and Louisville Railroad Company.

L. & N. R. R. Co. vs. Palmes (1883), 109 U. S. 251.

> The Bluff City Insurance Company was incorporated by the Legislature of Tennessee, and certain immunities from taxation was secured to it. Subsequently, the DeSoto Insurance Company was incorporated; and all the rights, privileges and immunities of the Bluff City Insurance

Company were granted the DeSoto Company. Afterward the Washington Fire and Marine Insurance Company was incorporated; and to it was granted all the rights and privileges (omitting the word "immunities") of the DeSoto Company. The Supreme Court says (page 177): In granting to the DeSoto Company all the rights, privileges and immunities of the Bluff City Company all words were used which could be regarded as necessary to carry the exemption from taxation possessed by the Bluff City Company; while in the next following grant, that of the plaintiff in law (The Washington Company), the word "immunities" is omitted.

Held, that the omission of the word "immunity" disclosed an intention on the part of the Legislature to deny the exemption to the new company.

Phoenix Insurance Company vs. Tennessee (1895), 161 U. S. 174.

To the same effect are the State decisions.

The Morris and Essex Railroad Company leased all its property, franchises, *immunities*, rights, powers and privileges to the Delaware, Lackawanna and Western Railroad Company. A subsequent Act of the Legislature of New Jersey validated and confirmed the lease and authorized the D. L. & W. R. R. Co. to have power to use, enjoy, possess and exercise all and singular the property, things, franchises, *immunities*, rights, powers and privileges of the Morris and Essex Railroad Company.

Held, that this transferred the immunity from taxation enjoyed by the Morris and Essex Railroad Company.

State Board of Assessors vs. Morris and Essex R. R. Co., 49 N. J. 193-211.

The terms of decree of sale to a Railroad Company provided that the purchaser should be vested with all the

rights, privileges and *immunities* appertaining to the franchise so called, and under the Act incorporating the Company and amendments thereto.

Held, that this transferred to the purchaser the immunity from taxation enjoyed by the corporation sold.

State vs. Railroad, 80 Tenn., pages 583-594.

That the word "immunity" is apt to convey an exemption from taxation, see also—

Memphis vs. Phoenix Insurance Company, 91 Tenn., pages 566-571.

If we come to the Maryland case, the only dissent to this familiar doctrine, an examination will disclose that no attempt is made to reconcile the decision in that case with the authorities above cited. They are not given even the courtesy of passing notice. The only reference to sections 187 and 188 of the Maryland Code is found in the four lines at the bottom of page 98.

The learned Court cites—

The Chesapeake and Ohio Railroad Company vs. Miller, 114 U. S. 186, and

Picard vs. Tennessee Railway Company, 130 U. S. 641.

Wilson vs. Gaines, 103 U. S. 417.

Morgan vs. Louisiana, 93 U. S. 217.

All of these are authorities upon the following proposition: That a grant of "*all the powers and privileges*," or all the "*rights, powers and privileges*" will not carry an exemption from taxation.

This doctrine, on the authority of these cases, appears to be now well established. We are dealing, however, with a grant in terms much broader than these; a grant of "all the powers, rights, *immunities*, privileges and franchises."

It is equally well established that the use of the word "*immunities*" is the apt term to cover an exemption from taxation such as was secured to the original company by Section 24, of Chapter 133, of the Acts of 1886.

At the time of the incorporation of the Baltimore, Chesapeake and Atlantic Railway Company, viz., in 1894, there was an unbroken line of decisions in the Federal and State Courts that the employment of the word "immunities" conveyed an exemption from taxation; and those interested in this project as to capitalization, had a right to read into their charter the additional and very material value which this exception added to the charter. Every purchaser of bonds and stock had a right to rely upon it in determining the security for the bonds and the prospects of the company.

Can it be that a suitor in this Court entitled to apply to it for justice by reason of citizenship in another State, whose right accrued at a time, *i. e.*, in the year 1896, when he purchased the said bonds, and when the Supreme Court's decisions were his only guide as to the legal effect of the statute, is to be turned from the doors of this Court on the ground that this Court cannot determine the justice of his claim, because it is concluded by the Maryland decision, rendered in a case to which the suitor in this Court was neither a party nor a privy?

PART 2.

HAS THE EXEMPTION THUS SECURED TO THE BALTIMORE, CHESAPEAKE AND ATLANTIC RAILWAY COMPANY BEEN REPEALED?

It is contended in behalf of the Petitioners that it may be conceded *gratia arguendi* that Sections 187 *et seq.* Maryland Code, 1888, (being Sections 275 and following of the Maryland Code, Edition 1904), conferred the immunity from taxation granted the Baltimore and Eastern Shore Railroad Company by the Acts of 1886, Chapter 133, upon the Baltimore, Chesapeake and Atlantic Railway Company, because the general assessment law of 1896, Chapter 120, of the Acts of Assembly

of Maryland, by its provisions repeals the Act of 1886, Chapter 133.

This necessitates an examination of the Act of 1896, Chapter 120, in its relation to the Act of 1886, Chapter 133.

Chapter 120 of the Acts of 1896 discloses no references in express terms to the Act of 1886, Chapter 133, or to the Baltimore and Eastern Shore Railroad Company, or to its successor, the Baltimore, Chesapeake and Atlantic Railway Company, nor does it contain any provision repealing the exemptions conferred by special Acts prior in date thereto, so that at the outset the Petitioners are confronted with the task of satisfying the Court that the *general* law, known as the "Assessment Law, 1896, Chapter 120," repealed *by implication* the *special* law of 1886, Chapter 133, which conferred immunity from taxation upon the Baltimore and Eastern Shore Railroad Company, which in turn was secured to the Baltimore, Chesapeake and Atlantic Railway Company by Sections 187 and following of the Code of 1888 (being Sections 275 and following of the Code of 1904.)

If the title of Chapter 120 of 1896 is examined it will be found to be an Act *repealing and re-enacting with amendments certain sections of Article 81 of the Code of Public General Laws* (Code of 1888), entitled "Revenue and Taxes," and adding certain new sections thereto. The sections thus repealed and re-enacted with amendments are Sections 1, 2, 4 and 141 and 146.

It is essentially an amendatory Act.

In order to determine the changes made in these sections by Chapter 120 of the Acts of 1896, it will be necessary to compare these sections as they stand in the Code of Public General Laws, known as Code of 1888, with the sections as re-enacted with amendments by Chapter 120 of the Acts of 1896.

Section 1 of Article 81 of the Code of Public General Laws, being the Code of 1888, provides :

"All State and county taxes, and all taxes in the City of Baltimore, shall be levied upon the assessment heretofore made, and such further assessments as may hereafter be made agreeably to law, unless otherwise directed in the Act of Assembly levying said taxes."

Section 1 of Chapter 120 of the Acts of 1896, as repealed and re-enacted, with amendments, provides :

"All State and county taxes and all municipal taxes shall be levied upon the assessments made in conformity to the provisions of this article, and in conformity with all laws relating to revenue and taxes and not embraced in this article."

The concluding language of this Section as amended is significant. It does not provide that all Acts or parts of Acts inconsistent with the provisions of this article are repealed, but specifically recognizes the validity of all those laws relating to revenue and taxes which are not embraced in the article.

It must be borne in mind that at the time this law was passed the appellee was exercising its franchise under the claim of exemption secured to the Baltimore and Eastern Shore Railroad Company by Chapter 133 of the Acts of 1886 and had been doing so continuously since its formation in 1894.

It is submitted that it would be difficult to frame language, short of explicit reference thereto, better calculated than this to express an intention that the provisions of the Act of 1886, chapter 133, were *not* to be repealed.

Section 2 of Article 81 of the Code of Public General Laws, (1888), read as follows :

"All interest, shares or proportions owned by residents of this State in all ships or other vessels registered in a port of Maryland, whether such ships or other vessels be in or out of port, are and shall be subject to valuation and

assessment to the respective owners thereof in the county or city in this State in which such owners shall respectively reside; all real property in this State belonging to any bank incorporated under the laws of this State, or of any other State, or to any national bank located in this State, or to any company or corporation incorporated by or under the laws of this State, or of any other State, or under the laws of the United States, or of any territory, or to any joint stock company doing business in this State, is and shall be subject to valuation, assessment and levy of taxes thereon for State, county and municipal purposes by the county commissioners of the respective counties in which such real property is situated, or by the appeal tax court of Baltimore City, if such real property is located in said city, as the property of such bank, company corporation or joint stock company; and such bank, company, corporation or joint stock company shall pay the taxes thereon so assessed and levied. All shares in any joint stock company, and all shares of stock in any bank, incorporated under the laws of this State, or in any national bank located in this State, or in any incorporation incorporated under the laws of this State, other than railroad companies working their respective railroads by steam power, not exempted from taxation by irrepealable contract with this State, are and shall be subject to valuation and assessment to the owners thereof in the county or city in this State in which such owners may respectively reside, in the manner provided for by this Code; and the taxable values of such shares shall be ascertained and finally determined, and the taxes thereon levied and collected in each year, under the regulations hereinafter prescribed, or as the same may be hereafter provided by law; all shares of stock, or shares in any bank, other than a national bank, or in any company or corporation incorporated by or located in and doing business in any other State, or in any territory or country, owned by residents

of this State; all bonds, made or issued by any State, owned by residents of this State; all bonds made or issued by any territory or by any corporation, belonging to residents of this State; all investments in private securities of every kind and description, belonging to residents of this State; the real property located in this State, and the personal property owned by any corporation incorporated by this State, not having a capital divided into shares or having shares of capital stock which are wholly or in part exempted from taxation by this State, when the said real or personal property so owned by said corporation is not protected from taxation by the exemption of said shares of stock from taxation; and all other property of every kind, nature and description, within this State, shall be valued to the respective owners thereof in the manner prescribed by this Code, and shall be assessed and taxed as the property of such respective owners, according to such prescribed methods of valuation, except as provided in section 4 of this article."

This section, as repealed and re-enacted with amendments by Chapter 120 of the Acts of 1896, reads as follows:

"All interests, shares or proportions owned by residents of this State in all ships or other vessels, whether such ships or other vessels be in or out of port, are and shall be valued and assessed for the purpose of State, county and municipal taxation to the respective owners thereof in the county or city in the State in which said owner or owners shall respectively reside, and such respective owners shall pay the taxes thereon. All real properties in this State belonging to any bank incorporated under the laws of this State or of any other State or belonging to any national bank located in this State, or to any company or corporation incorporated by or under the laws of this State, or of any other State, or under the laws of the United States, or of any territory, or under the laws of the

United States relating to the District of Columbia, or belonging to any joint stock company doing business in this State, is and shall be valued and assessed for the purpose of State, county and municipal taxation as the property of such bank, company, corporation or joint stock company, and such bank, company, corporation or joint stock company shall pay such respective taxes thereon. All money belonging to residents of this State, which shall be the proceeds of the sale of stocks, bonds or other property disposed of for the purpose of evading and escaping taxation; all shares or interest in any joint stock company, and all shares of stock in any bank incorporated under the laws of this State, or any national bank located in this State, or in any corporation incorporated under the laws of the State, shall be valued and assessed for the purpose of State, county and municipal taxation, to the owners thereof in the county or city in this State in which said owners may, respectively, reside; the taxable value of such shares shall be ascertained and determined, and the taxes thereon levied and collected as is now or may be hereafter provided by law.

"All personal property in which any resident of this State has an equitable interest with the legal title to the same in some other person or corporotion who is a non-resident shall be valued and assessed for the purposes of State, county and municipal taxation to the equitable owner thereof in the county or city in which he, she or it resides, and such equitable owner or owners shall pay the taxes thereon.

"All shares of stock or shares in any bank other than a national bank, or in any company or corporation incorporated by or located in, and doing business in any other State or District of Columbia, or in any territory or foreign country owned by residents of this State, shall be valued and assessed for the purposes of State, county and munic-

ipal taxation, to the owners thereof in the county or city in which said owners may, respectively, reside. All bonds made or issued by any State or District of Columbia or territory or by any corporation whatsoever belonging to the residents of this State, all investments in private securities of every kind and description belonging to residents of this State, the real property located in this State, and the personal property owned by any corporation incorporated by this State, not having a capital divided into shares, or having shares of capital stock which are wholly or in part exempted from taxation by this State when such real or personal property so owned by said corporation is not protected from taxation, by the exemption of said shares of stock from taxation, shall be valued and assessed for the purpose of State, county and municipal taxation to the owners thereof, in the county or city in which such owners may respectively reside; all certificates of indebtedness or evidences of debt in whatever form made or issued by any State, territory or by the District of Columbia, or by any public corporation or by any foreign country owned by residents of this State, shall be valued and assessed for State, county and municipal taxation to the owners thereof in the county or city of this State in which such owners may, respectively, reside.

"The property, real and personal, of each and every railroad company in this State, working its roads by steam power, shall be valued and assessed for county and municipal purposes, in the same manner as the property of individuals may be valued and assessed under this Act; provided, that no extra assessment shall be made, and no extra or special tax shall be levied or collected on any bridge over streams forming any part of the roadway of any railroad or turnpike company in this State, it being the meaning and intent of this Act, that any bridge over streams forming a portion of the roadway of any of said

railroads and turnpike shall be valued at the same rate that any other equal portion of said road is valued; and provided further, that all tunnels or subways forming a part of the roadways or subways of any railroad or turnpike company or other corporation shall be valued at their actual worth, as other property in this State is required to be valued under the provisions of this Act; and the provisions of section 155 of this article, in so far as the same are in conflict with the preceding provision of this section relating to tunnels, is hereby expressly repealed. The shares of capital stock of national banks located in this State, and of all other corporations incorporated under the laws of this State, shall be valued and assessed to the owners thereof residing in the city of Baltimore, and in the several counties of this State, at the same rate at which the same have been or shall be valued by the State Tax Commissioner for the year 1896; subsequent valuation of said stock shall be made in the manner now or hereafter provided by law; and it shall be the duty of the State Tax Commissioner to furnish the assessors in the city of Baltimore, and of the several counties, with a copy of the valuation so made of the shares of capital stock of each of such banks, and each and every of such corporations of this State for the year 1896; and the said assessors shall record in a separate book all valuations and assessments of all shares of stock of all corporations incorporated under the laws of this State, having a capital stock, whether the same be divided into shares or not, together with the names and residences of persons having an interest therein, the amount of such interest; and upon the completion of the assessment of all the taxable property in any county of this State, or any assessment district of Baltimore city, said book shall be delivered to the State Tax Commissioner for his information and guidance in the discharge of his official duties; and the valuation and assessment of said shares of stock shall not be returned

by the said assessors to the Boards of County Commissioners acting as Boards of Control and Review for the several counties and the Boards of Control and Review of Baltimore city. All bonds and certificates of indebtedness bearing interest, issued by any railroad or other corporation of this State, secured by mortgage of property wholly within this State, belonging to residents of this State, shall be subject to valuation, assessment and taxation to the owner or owners thereof, in the same manner as like bonds or certificates of indebtedness, bearing interest and secured by mortgage of property partly in this State and partly in some other State or States, are now subject to valuation and assessment under the laws of this State. All other property of every kind, nature and description within this State, except as provided by the fourth section of this article, shall be valued and assessed for the purpose of State, county and municipal taxation to the respective owners thereof in the manner prescribed by this article, provided, nothing contained in this section or Act shall repeal, modify or affect Sections 86 and 86 'A' of this article relating to the taxation of savings banks or the Act of 1892, Chapter 704, relating to the taxation of distilled spirits."

There are several significant changes made in the amended section, to which attention is directed.

Thus it will be observed that the following language of Section 2 of the Code, namely:

"All shares in any joint stock company and all shares in any bank incorporated under the laws of this State, or any national bank located in this State, or in any corporation incorporated under the laws of this State other than railroad companies working their respective railroads by steam power not exempt from taxation by irrepealable contract with this State, are and shall be subject to valuation and assessment to the owners thereof, etc."

Is changed in the amended section so as to read as follows:

> "All shares or interest in any joint stock company, and all shares of stock in any bank incorporated under the laws of this State, or any national bank located in this State, or in any corporation incorporated under the laws of this State valued and assessed for the purposes of State, County or Municipal taxation, to the owners thereof in the County or City in this State in which said owners may respectively reside, etc."

It will be noted that the language "other than railroad companies working their respective railroads by steam power not exempt from taxation by irrepealable contract with this State" is not to be found in the amended section, and it is submitted that the failure to use this language in the amended section is a distinct recognition on the part of the Legislature of the existence and continued validity of repealable concessions, bounties and contracts enjoyed by certain railroad corporations which could not be conceded to be irrepealable contracts.

The paragraph beginning "The property, real and personal, of each and every railroad company in this State, working its road by steam power, shall be valued and assessed for county and municipal purposes in the same manner as the property of individuals may be valued and assessed, etc.," is not to be found in Section 2 of the Code of Public General Laws, but is to be found almost word for word in Section 155 of Article 81, which section, indeed, an attempt is made to repeal in so far as the same is in conflict with the language employed by the amended and re-enacted section.

Now, this part of Section 2, Chapter 120, of the Acts of 1886, is relied upon by the petitioners to show a clear intention on the part of the Legislature to repeal the exemption conferred by the Act of 1886, Chapter 133.

It is submitted, however, that the petitioners cannot rely upon this language as an expression of intention on the part of the

Legislature to repeal the Special Act of 1886, for the following reasons:

(1st.) Because this language is no broader than that to be found in Section 155 of Article 81, which was in force at the time the exemption secured by Chapter 133 of the Acts of 1886 was granted the Baltimore and Eastern Shore Railroad Company, and in so far as it can be held to imply a repeal of this exemption, is copied word for word from Section 155.

(2d.) Because this part of Section 2 of Chapter 120 of the Acts of 1896 is unconstitutional, being an attempt to incorporate into an amendment of Section 2 a distinct section of Article 81, which is not named in the title of the Act.

Constitution of Md., Article III, Section 29.
Davis vs. State, 7 Md. 151-158.
Stiepel vs. Md. Inst. for Blind, 61 Md. 144-147.

When the sections to be amended are *specified*, matter cannot be introduced by way of amendment to such sections, which is provided for elsewhere in the Act.

Thus an Act to amend Sections 10, 12 and 14 of an Act in regard to licensing occupations, brought into these sections by amendment licenses for the business of refining sugar and molasses, which was provided for in Section 11 of the original Act. It was held to be void, as not within the title of the Act.

State vs. Amer. Sugar Ref. Co., 106 La. 553, 564.
Southerland Stat. Constr. (2d Edition), page 239.

As well might it be contended, that it effected an amendment of Article 23 of the Code, Section 204, which would indeed appear to be claimed (See Code 1904, Article 23, Sec. 293.)

Coming now to Section 4 of Article 81 of the Code of Public General Laws, we find it reads as follows:

> "The provisions of section 2 and 3 of this article shall not apply to any bonds, stock or evidence of debt issued by the United States, or to any property belonging to the

United States, or to this State, or to any county, or incorporated city or town in this State, nor to houses or buildings used exclusively for public worship, or to the furniture contained therein, or to the parsonages connected therewith, or to the grounds appurtenant to such houses, or to buildings so exclusively used for public worship, or as parsonages which are necessary for the respective uses thereof; nor shall the provisions of said sections apply to graveyards, cemeteries or cemetery companies which do not accumulate profits for any purpose except the maintenance or improvement of such cemeteries or graveyards as cemeteries or graveyards; nor to burying grounds set apart for the use of any family, or belonging to any church or congregation, or to the crop or produce of any land in this State in the hands of the producer or his agent; or to the provisions kept for the use and consumption of the family of the person to whom the same shall belong; or to the working tools of mechanics and manufacturers, moved or worked exclusively by hand; or to wearing apparel of any description; or to fish while in the possession of the fishermen employed in catching, salting and packing the same, or while in the possession of their agents unsold; or to the buildings, equipment and furniture of hospitals, asylums, charitable or benevolent institutions, or to the ground appurtenant thereto, in any city or incorporated town in this State, which is necessary for the respective uses thereof; nor to the buildings, equipment and furniture of hospitals, asylums, charitable or benevolent institutions, in any county of this State, but not within any city or incorporated town in this State, nor to the ground, not exceeding forty acres, appurtenant respectively thereto, which is necessary for the respective uses thereof; nor to the buildings, furniture, equipment or libraries of incorporated educational or literary institutions, or to the ground appurtenant thereto, in

any city or incorporated town in this State, which is necessary for the respective uses thereof; nor to the buildings, furniture, equipment or libraries of incorporated educational or literary institutions in any county of this State, but not within any city or incorporated town in this State, nor to the ground, not exceeding forty acres, appurtenant respectively thereto, which is necessary for the respective uses thereof; nor to the property, real or personal, of any corporation incorporated by this State, and having a capital stock divided into shares, when said shares only are subject to taxation under the laws of this State; nor to any shares of stock in any corporation, when said shares of stock are exempted by contract with this State from taxation under the laws thereof; nor to any property of any corporation whose shares of capital stock are exempted from taxation, when said property is protected from taxation by the exemption of said shares from taxation; nor to the shares of stock of railroad companies worked by steam, incorporated by or under the laws of this State, which are subject to State taxation upon their gross receipts within this State, and to county and municipal taxation upon their respective real and personal taxable properties in the respective counties and cities of this State in which such respective properties are located; nor to the value of such portions of the shares of homestead or building associations as may be represented by mortgages upon real or leasehold property within this State, when such real or leasehold estate so mortgaged is subject to taxation under the laws of this State; nor to such mortgages when the real or leasehold estate so mortgaged is subject to taxation under the laws of this State; nor to mortgages upon property wholly within this State; nor to the mortgage debts secured thereby; but each and every one of said exemptions from taxation shall be strictly construed."

This section, as repealed and re-enacted with amendments by Chapter 120 of the Acts of 1896, reads as follows:

"The provisions of this article shall not apply to any bonds or stocks or evidence of indebtedness, issued by the United States belonging to residents of this State, nor to any property in this State belonging to the United States or to this State, or to any county of this State, or incorporated city or town in this State, nor to houses or buildings used exclusively for public worship, nor to the furniture contained therein, nor to the parsonage connected therewith, nor to the grounds appurtenant to such houses, nor to buildings so exclusively used for public worship or as parsonages which are necessary for the respective uses thereof; nor shall the provisions of this article apply to graveyards, cemeteries or cemetery companies which do not accumulate profits for any purpose except for the maintenance or improvement of such cemeteries or graveyards as cemeteries or graveyards, nor to burying grounds set apart for the use of any family or belonging to any church or congregation, nor to crops or produce of any land in the hands of the producer or his agent, nor to provisions and fuel kept for the use and consumption of the family of the person to whom such provisions and fuel shall belong, nor to the working tools of mechanics or artisans, moved or worked exclusively by hand, nor to the first three hundred dollars in value of the farming implements of any farmer, nor to wearing apparel of any description, except diamonds and other costly jewelry not habitually worn on the person; nor to fish while in the possession of fishermen employed in catching, salting and packing the same, or while in possession of their agents unsold; nor to buildings, equipment and furniture of hospitals, asylums, charitable or benevolent institutions, or to the grounds appurtenant thereto, in any city or incorporated town of this State which is necessary to the respective uses thereof, nor to the buildings, equipments and furniture of hospitals, asylums, charitable

or benevolent institutions in any county of this State, but not within any city or incorporated town of this State, nor to the ground not exceeding forty acres appurtenant respectively thereto, which is necessary for the respective uses thereof, nor to the buildings, furniture, equipment or libraries of incorporated educational or literary institutions, or to the ground appurtenant thereto, in any city or incorporated town of this State which is necessary for the respective uses thereof; nor to the buildings, equipment or libraries of incorporated educational or literary institutions in any county of this State, nor to the ground, not exceeding forty acres, appurtenant respectively thereto, which is necessary for the respective uses thereof; nor to the personal property of any corporation incorporated by this State and having capital stock divided into shares, when said shares of said corporation are subject to taxation under the laws of this State, nor to the shares of stock of railroad companies working their roads by steam power, incorporated by or under the laws of this State, which are subject to taxation upon their gross receipts within this State, and to the county and municipal taxation upon their respective real and personal property in the respective counties and cities of this State, in which such respective properties are located, nor to the book accounts or bills receivable or evidences of debt given for such accounts of any person engaged in commercial business who is taxed upon a fair average value of his stock of goods, wares and merchandise; and every person engaged in commercial business shall be taxed upon the fair average value of his stock in such business during the year preceding the assessment upon which such tax is levied; and each and every one of said exemptions from taxation shall be strictly construed."

A comparison of these two sections will show no material change in the law relating to exemptions from taxation enjoyed

by the Railroad Companies. Both sections contemplate the existence in the State of railroads which do not pay any tax upon their gross receipts. Both sections contemplate railroad property in the State which is exempt from the payment of county and municipal taxes.

Coming next to section 146 of the Code of Public General Laws, we find it reads as follows:

> "A State tax of one-half of one per centum is hereby levied annually upon the gross receipts of all railroad companies worked by steam, incorporated by or under the authority of this State and doing business therein; and the said tax shall be due and payable at the treasury on or before the first day of March in each and every year."

Section 146 as repealed and re-enacted, reads as follows:

> "A State tax, as a franchise tax, is hereby levied annually upon the gross receipts of all railroad companies whose roads are worked by steam power incorporated by or under the authority of this State or any other State, territory, District of Columbia or foreign country and doing business in this State, such State tax being as follows, to wit:"

It will thus be seen that this language of Section 146, as amended, is no broader than Section 146 of the Code of Public General Laws, which was in force at the time the immunity from taxation was granted the Baltimore and Eastern Shore Railroad Company by Chapter 133 of the Acts of 1886, and *that part* of the Section 146 of Chapter 120 of the Acts of 1896, which upon any theory can be held to apply to the Baltimore, Chesapeake and Atlantic Railway Company, is taken *ipsissimis verbis* from Section 146 of the Code of 1888.

It will be found, therefore, that every one of the Sections of Chapter 120 of the Acts of 1896, which are relied upon by Petitioners to show an intention on the part of the Legislature to repeal by this *general* law the *special* law of Chapter 133 of

the Acts of 1886 are *merely copied without change from the law as it stood when Chapter 133 of the Acts of 1886 was passed, and are not considered by the well recognized rule of legislative construction as repealed and re-enacted, but to have been the law all along.*

When there is an express repeal from an existing statute and a re-enactment of it at the same time, or a repeal or re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time.

State vs. Baldwin, 45 Conn. 134-144.
United Hebrew Building Association vs. Benshimol, 130 Mass. 325-327.
Middleton vs. New Jersey, 26 N. J. Equity, 269-273.
Santa Cruz Rock Pavement Co. vs. Lyons, 133 Cal. 114, 116.
Matter of Estate of Perine, 136 N. Y. 347, 353.
State Trust Co. vs. Kansas City P. & G. R. Co., 115 Fed. Rep. 367, 372.
Ely vs. Holton, 15 N. Y. 595-598.
Fuller vs. U. S., 48 Fed. Rep. 654-655.
Mowe vs. Township of Kenockee, 75 Wis. 335.
Hancock vs. Dist. Treas. of Perry, 78 Iowa, 550, 555.
Southerland Stat. Constr. (2d Ed.), pages 443-445.

Hence, it is submitted, Chapter 120 of the Acts of 1896, in so far as it is a re-enactment of laws which were in force in 1886, when Chapter 133 was passed, does not qualify or modify Chapter 133 of the Acts of 1886.

This is a well-settled rule of Legislative Construction, and is said to be especially true if the intermediate law is *special* or

particular and the re-enactment law is a *general* law on the same subject.

State vs. Commissioners of Public Lands, 106 Wis. 584-586.
Olsen vs. Haretwen, 57 Fed. Rep. 846, 849.
Harrison vs. Board of Supervisors, 117 Mich. 215-217.
Hawes vs. Fliegler, 87 Minn. 319-322.
Bentley vs. Adams, 92 Wis. 386-392.
Southerland on Legislative Construction, pages 524 and 525 (Second Edition).

That a *general act* is not to be construed to *repeal a previous particular act* unless there is some express reference to the previous statute on the subject, or unless there is a necessary inconsistency in the two acts standing together is a rule of construction recognized and applied by this Court.

State vs. Stone, 17 Wallace 465.
Cass County vs. Gillette, 100 U. S. 585.
Ex parte Crow Dog, 109 U. S. 566.
U. S. vs. Rodgers, 185 U. S. 87 and 88.

To Recapitulate.

Chapter 120 of the Acts of 1896 did not repeal the provisions of Chapter 133 of the Acts of 1886, because

(1st.) Chapter 133 of the Acts of 1886 is a *special* law and Chapter 120 of the Acts of 1896 is a *general* law, containing no express reference to Chapter 133 of the Acts of 1886, or to the Baltimore and Eastern Shore Railroad, or to the Baltimore, Chesapeake and Atlantic Railway Company, or to a repeal of existing exemptions in general terms.

(2d.) Because Chapter 120 of the Acts of 1896 is a repeal and re-enactment of certain sections of Article 81 of the Code of Public General Laws of 1888, without material change, all of which were in full force at the time of the passage of Chapter

133 of the Acts of 1886. Or in other words, in so far as any of the provisions of Chapter 120 of the Acts of 1896 can be held to apply to the Baltimore, Chesapeake and Atlantic Railway Company, the same were in force at the time of the passage of Chapter 133 of the Acts of 1886, and, therefore, there can be no *necessary inconsistency* in the two Acts, viz.: Chapter 133 of the Acts of 1886 and Chapter 120 of the Acts of 1896, standing together.

PART 3.

IF THE IMMUNITY FROM TAXATION CONFERRED UPON THE BALTIMORE AND EASTERN SHORE RAILROAD COMPANY BY CHAPTER 133 OF THE ACTS OF 1886 WAS TRANSFERRED TO AND IS NOW ENJOYED BY THE BALTIMORE, CHESAPEAKE AND ATLANTIC RAILWAY COMPANY BY VIRTUE OF SECTION 187 ET SEQ., CODE 1888 (BEING SECTION 275 ET SEQ., CODE 1904), TO WHAT PROPERTY NOW OWNED BY THE BALTIMORE, CHESAPEAKE AND ATLANTIC RAILWAY COMPANY DOES THIS IMMUNITY EXTEND?

We have already seen that the property in Wicomico county covered by the mortgage to secure the bonds owned by the respondent may be divided into three classes:

Class A. The property formerly belonging to the Baltimore and Eastern Shore Railroad Company and forming a part of the line built by it under its charter power to construct a road between Eastern Bay and Salisbury.

Class B. The property formerly owned by the Baltimore and Eastern Shore Railroad Company and acquired by it under its purchase of the Wicomico and Pocomoke property.

Class C. Property at no time owned by the Baltimore and Eastern Shore Railroad Company, but acquired by the Baltimore, Chesapeake and Atlantic Railway Company subsequent to its organization. This last class consists mainly of steamboats and wharf property.

It was decided by the learned Judge of the Circuit Court of the United States for the District of Maryland that the immu-

nity from taxation secured to the Baltimore, Chesapeake and Atlantic Railway Company must be confined to Class A, and this opinion was affirmed by the learned Judge of the United States Circuit Court of Appeals.

It is submitted, however, that the exemption should include Class B. and Class C., as well as Class A.

The Record shows ("Agreed Statement of Facts," page 28) that Wicomico and Pocomoke Railroad extended from Salisbury at the Eastern terminus of the Baltimore and Eastern Shore Railroad to Ocean City on the Atlantic Coast, and that the Baltimore and Eastern Shore Railroad Company acquired by purchase in the year 1890, said Wicomico and Pocomoke Railroad and consolidated it with its own property. In doing so the Baltimore and Eastern Shore Railroad Company was acting well within the scope of its powers. Section 4, of its amended Charter, Chapter 133 of the Acts of 1886, Record, page 27, provides that it "shall have the power to unite, connect and consolidate with any railroad company or companies either in or out of the State, so that the capital stock of said companies so united, connected and consolidated, respectively, may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company and be entitled to all the property, franchises, rights, privileges and immunities which each of them possess, have and enjoy under and by virtue of their respective charters."

Here again is employed the apt and technical term "*immunities.*" After the acquisition of the Wicomico and Pocomoke Railroad Company, it became a part of the Baltimore and Eastern Shore Railroad Company; together they thereafter constituted one company having a common stock, with one terminus in the east at Ocean City, the other in the west at Claiborne; and all the property, franchises, rights, privileges and *immunities* which the Baltimore and Eastern Shore Railroad Company enjoyed were conferred upon the Wicomico and Pocomoke Railroad Company; and reciprocally all the rights,

privileges and immunities which the Wicomico and Pocomoke Railroad Company enjoyed were conferred upon the Baltimore and Eastern Shore Railroad Company.

How can it be contended under the specific and technical language of this section of the amended charter that the exemption from taxation enjoyed by the Baltimore and Eastern Shore Railroad Company did not instantly extend to and affect the Wicomico and Pocomoke Railroad Company? That it did *eo instanti* so extend is supported alike by reason and upon authority.

L. and N. Railroad vs. Palmes, 109 U. S. 215.
Phoenix Insurance Co. vs. Memphis, 161 U. S. 174.
Board of Assessors vs. M. & E. R. R. Co., 49 N. J. L. 193.
State vs. Railroad, 80 Tenn. 583, and cases heretofore cited.

When the Baltimore and Eastern Shore Railroad Company was sold under foreclosure proceedings, the Wicomico and Pocomoke Railroad had become a constituent and practically indistinguishable part of the same, and passed to the purchaser as such; and if it be conceded that the exemption from taxation was conferred upon the successors of the Baltimore and Eastern Shore Railroad Company by sections 187, 188 and 189 of article 23 of the Public General Laws of Maryland, namely, the Baltimore, Chesapeake and Atlantic Railway Company, such exemption must extend to that part formerly known as the Wicomico and Pocomoke Railroad equally and as fully as to any other section or class of the company's road or property.

Exemption as to "Class C."

It was decided by the decree of the learned Court below that the exemption from taxation enjoyed by the Baltimore, Chesapeake and Atlantic Railway Company as successor to the Baltimore and Eastern Shore Railroad Company did not extend to

"Class C;" namely, that property at no time owned by the Baltimore and Eastern Shore Railroad, but acquired by the Baltimore, Chesapeake and Atlantic Railway Company subsequent to its organization, consisting mainly of steamboats and wharves.

It is difficult to understand upon what ground this contention can be supported.

The nature of the exemption enjoyed by the Baltimore, Chesapeake and Atlantic Railway Company can be determined only by powers, rights, immunities, privileges and franchises which were granted the Baltimore and Eastern Shore Railroad Company under its charter and amendments, and to which the Baltimore, Chesapeake and Atlantic Railway Company succeeded, by virtue of sections 187 and 188, etc., of Article 23 of the P. G. L. of Maryland (1888).

If reference be had to section 1 of Chapter 133 of the Acts of 1886 (Record, page 27), it will be found that the Baltimore and Eastern Shore Railroad Company had authority to—

> "Construct and operate branch roads, to lease, buy and improve lands for pleasure resorts along the line of their road, to lease, buy and build wharves, houses and shops for corporate purposes, to charter, purchase and hold steamboats and barges, to ply in connection with their railroad to any port or ports, place or places whatsoever, and to contract with the owners of any steamboat or other railway company for the transportation of freights and passengers to and from any such railroads or steamboats."

That said Act further provides as follows:

> Section 2. "That said corporation shall have perpetual existence, and its franchises, property, shares of capital stocks and bonds shall be exempt from all State, county or municipal taxation for the term of thirty years, accounting from the date of the completion of said road between the termini mentioned in its charter."

Can it be doubted that under these sections any steamboats or wharves belonging to the Baltimore and Eastern Shore Railroad Company, and acquired by it in the manner indicated by the statute, at any time during the life of the exemption were protected from taxation?

The exemption enjoyed by the Baltimore and Eastern Shore Railroad Company was transferred to the Baltimore, Chesapeake and Atlantic Railway Company, with full force and effect for the remainder of unexpired term of thirty years. The Baltimore, Chesapeake and Atlantic Railway stepped into the shoes of the Baltimore and Eastern Shore Railroad Company, with "all its rights, powers, privileges, immunities and franchises"—not with less.

The original company could certainly have claimed this privilege in respect to its steamboats and wharves as a part of its "property." No less claim must be conceded to its successor.

III.

Discussion of the case of State vs. County Commissioners of Wicomico County, decided by the Court of Appeals of Maryland, reported in 63 Atlantic Reporter, 678.

Counsel for the respondent is aware that since the institution of this cause of action and since the decision reached by the Circuit Court of Appeals herein a suit has been filed by the petitioners against the Baltimore, Chesapeake and Atlantic Railway Company and a decision secured from the Court of Appeals of Maryland, in which a construction is put upon Chapter 120 of the Acts of 1896 at variance with the argument hereinbefore submitted.

That serious consideration should be given to the construction of a State statute by the highest Court of that State, when Federal Courts are called upon to interpret the same statute must be conceded. The exigencies of sound legal conclusions

must alone warrant a variance between judgments arrived at by Courts whose powers in any field of investigation are co-ordinate. These reasons, apart from any question of courtesy, require an examination of the decision of the Court of Appeals of Maryland and the law relied upon to support its conclusion.

The Court, after re-affirming its decision in the earlier Maryland case, reported in 89 Maryland, page 89, that Sections 187 and following, of the Code of 1898 (being Sections 275 and following, Code 1904) did not confer immunity from taxation granted to the Baltimore and Eastern Shore Railroad Company by Chapter 133 of the Acts of 1886, upon the Baltimore, Chesapeake and Atlantic Railway Company, and which decision we have attempted to show is at variance with the decisions of this Court in construing similar stautes, further decides that the immunity from taxation granted the Baltimore and Eastern Shore Railroad by Chapter 133 of the Acts of 1886, was a mere bounty or gratuity creating no contract in the technical sense of that term and, therefore, presenting no federal question within Section 1, Clause 10, of the Constitution of the United States, which last conclusion, so far as the contention of this respondent for the purposes of this argument is concerned, may be conceded.

The Court then proceeds, page 683:

> "If, therefore, we concede for the sake of argument, that the present appellant acquired by virtue of its incorporation under section 187, etc. of Article 23 of the Code (1886) the same kind of an exemption as that possessed by the Baltimore and Eastern Shore Railroad Company, we find it in possession of a mere gratuity, which might at any time be recalled by the State, and which placed no restriction upon the subsequent exercise of the taxing power of the State.
>
> "Now in this state of the case we find that in 1896 the State by the general assessment law enacted in Chapter

120 of the Acts of 1896, positively directed a new assessment for the purposes of taxation to be make of all property in the State and taxes to be levied thereon.

"Section 2 of that Act declared that the property, real and personal of any railroad in the State shall be valued and assessed for county and municipal purposes, and later on in the Act directs appropriate officials to proceed to tax such property. This if not a final repeal, which it is not disputed the Statute could have made, of the legislation under which the appellant claims its exemption, certainly would have amounted to a recall of the exemption, if any such there were, within the ruling of the last cited Federal cases, especially of the case of the West Wisconsin Railroad Company vs. Supervisors. See also County Commissioners vs. Franklin Railroad Company 34 Md. 159."

By "the last cited Federal cases" it is presumed the learned Judge means Christ Church vs. Philadelphia, 65 U. S. 300; Tucker vs. Ferguson, 89 U. S. 575; West Wisconsin vs. Supervisors, 93 U. S. 595; Grand Lodge vs. New Orleans, 166 U. S. 149.

A careful consideration of these cases fails to disclose any one of them to be apposite citations for the repealing of a special law by a general law by implication. They are well recognized authorities on the question as to distinctions between legislative acts, which constitute contracts, and legislative acts, which are quasi contracts, concessions or bounties; so, also, it is admitted, is the citation of the case of County Commissioners vs. Franklin Railroad Company, 34 Md. 159, inapposite. That is indeed a case dealing with the repeal of *special* exemptions from taxation by *general* act, but the general act in this instance in its 33d section contains a clause expressly repealing all laws exempting property from valuation and was a distinct departure from the previous assessment law of 1852, Chapter 337, which contained no such provision.

See—County Commissioners vs. Franklin R. R. Co., 34 Md., page 163.

The well recognized rules of legislative construction bearing on the repeal of *special laws* by *general laws* receives no consideration at the hands of the Court, nor is the scope and effect of the legislation attempted by Chapter 120 of the Acts of 1896, examined with that particularity by the Court which, it is respectively submitted, should have been accorded such legislation, when the question under consideration was one seriously affecting property rights and values. The fact that the language of Section 2, quoted in the opinion, namely, that the property, real and personal of any railroad in the State shall be valued and assessed for county and municipal purposes appears word for word in Section 155 of Article 81 of the Code of 1888 is not adverted to by the Court, nor the unconstitutional aspects of this part of Section 2 passed upon.

In the earlier part of the opinion, the Court in referring to the general policy of the State with regard to local taxation of railroad property, says on page 681:

> "Furthermore this State has distinctly declared its policy with reference to local taxation of railroad property by legislative enactment which was in full force August, 1894, when the appellant was incorporated and still remains unrepealed. Section 155 of Article 81 of the Code of 1888 provides that the property real and personal of each and every railroad company in this State shall be assessed and taxed for county and municipal purposes in the same manner in which the property of individuals is now taxed. Even if the presence of Section 155 of the Statute had not made it inconsistent with the existing laws of the State so as to construe Section 187, etc., of Article 23 of the Code of 1888 as to make them operative and divest in the appellant by virtue of its incorporation under their provisions an exemption from taxation, such a construction would be in opposition to the well settled principle of law, to which we have already referred, governing the subject of exemption from taxation. The provisions of Section

187 did not become operative as to the appellant until it had accepted them by filing its certificate of incorporation and, therefore, for the purpose of ascertaining the extent of its powers and immunities, the law and paramount policy of the State as they existed at that time must be applied."

The fact that this Section 155 of Article 81 is to be found in Article 23 of Section 204 appears to have been overlooked by the learned Court, and also the fact that it was in force at the time the Baltimore and Eastern Shore Railroad Company was incorporated; at the time of the passage of Chapter 133 of the Acts of 1886 and at the time of the formation of the Baltimore, Chesapeake and Atlantic Railway Company in 1894. It is, therefore, submitted that in construing Sections 187 and following (Code 1888, being Sections 275, *et. seq.*, Code 1904) no inference as to the legislative policy of the State adverse to the contention of the respondent can possibly be drawn from the fact that Section 155 of Article 81 was in force as the Court points out.

Two other statements made by the learned Judge of the Court of Appeals of Maryland in this opinion require examination. The one, that Chapter 120 of the Acts of 1896 directs the appropriate officials to proceed to tax the real and personal property of every railroad in the State. (Page 683.) The language of the Act relied upon to support this contention is not quoted in the opinion, nor is the section referred to in which it can be found.

Diligence of counsel has not sufficed to discover any language in the Act that can be held to support this claim. The Assessors in their returns are required by Section 181 to *value* and *assess* all property, including property claimed to be exempt, and Section 182 provides that the County Commissioners acting as a Board of Control and Review, are "directed and required to examine carefully the several certificates, statements and returns

of valuations of property claimed to be exempted from valuation and assessment made by any assessors within their respective jurisdictions and to correct said returns of assessable property made to them," etc.

In compliance with the provisions of these sections it was the duty of the County Commissioners of Wicomico County to pass upon the exemptions asserted in behalf of the Baltimore, Chesapeake and Atlantic Railway Company. The claim in behalf of such exemption was recognized by the County Commissioners as valid and no attempt was made to tax the property of the Company under Chapter 120 of the Acts of 1896 until the year 1899. (Record, page 30.)

The second statement made in the opinion of the Court of Appeals of Maryland, to which attention is directed, is as follows (page 683):

> "It is a significant fact that in the last section of the Acts of 1896, Chapter 120, directing the general assessment, is found this proviso: 'Provided further, however, that nothing in this Act contained shall be held to discharge or release, impair or affect any irrepealable contract or obligation of any kind whatsoever existing at the date of the passage of this Act.'"

The inference which the Court seeks to convey is that inasmuch as only irrepealable contracts and obligations are specified in the Act, all repealable contracts and obligations are discharged and affected thereby.

Several answers to this point are suggested.

In the first place the language of the statute is ineffectual for any purpose. If a contract or obligation is irrepealable, it is manifestly beyond the power of the Legislature to deal with it, and hence a declaration by the Legislature that it does not intend to repeal such contracts and obligations can be of no significance from a legal point of view whatsoever.

Again, the learned Judge in the prior part of his opinion has decided that the immunity granted to the Baltimore and Eastern Shore Railroad Company *is not a contract but a concession or bounty*, and unless a concession or bounty can be defined as a "repealable obligation," and a plain intent on the part of the Legislature to repeal all "repealable obligations" discovered in the language employed, counsel is totally at a loss to know how this language can be held to repeal the immunity granted by Chapter 133 of the Acts of 1886.

It is submitted that no inference so remote and fanciful as this can be relied upon to repeal Chapter 133 of the Acts of 1886.

Had the Legislature intended to repeal such immunity, it would have been a very simple matter to have inserted the direct and unequivocal language which it inserted in the general assessment Act of 1876, which was the last general assessment Act preceding that of 1896.

In Section 2 of that Act (Act of Assembly 1876, Chapter 260), we find the following language:

> "All Acts or parts of Acts exempting any other property except that exempted by this Act from valuation, assessment or taxation for State, county or municipal purposes, which can be repealed by this General Assembly, are to the extent of such exemption, whenever or however the same has been heretofore granted, hereby expressly declared to be repealed to the extent of said exemption as aforesaid, and to be hereafter of no force or effect in granting such exemption."

It is contended, that with this language, which the Legislature had incorporated in the General Assessment Law of 1876, to guide them, far more significance is to be attached to its deliberate omission from the General Assessment Law of 1986, than the reference to irrepealable contracts and obligations referred to by the learned Court.

In conclusion, it may be conceded that a wise public policy decrees that claims in behalf of exemption from taxation should be closely scrutinized by Courts of Justice and every doubt resolved in favor of the power to tax.

The case at Bar does not, however, involve the question of the *power* to tax. It is admitted by this petitioner that the immunity granted by the Act of 1886, Chapter 133, can be recalled by the Legislature at will. In view of the power of the Legislature to thus declare its intention in language susceptible of no misconstruction, and in view of the opportunities in connection with such legislation, for a full and fair discussion by those interested, as to whether such exemption should be recalled, or left undisturbed, it is submitted that a judicial tribunal should not be diligent to conclude by its decree valuable rights which are properly the subject of deliberative action by a legislative body.

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